

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

EDWARD LEE HOLLOWAY, #744655	§	
	§	
V.	§	CIVIL ACTION NO. G-02-323
	§	
DR. ALBERT OGUEJIOFOR, ET AL.	§	

ORDER OF DISMISSAL


Before the Court for its Order of Acceptance is a Report and Recommendation of the United States Magistrate Judge, entered on April 29, 2005, which recommends that the above-styled cause be dismissed for failure to exhaust administrative remedies. Plaintiff has filed objections to the Report and Recommendation, asserting that he attempted to file his institutional grievances but was time-barred from doing so because he was hospitalized as a result of the heart attack made the basis of this suit. Interestingly, this contention differs greatly from the statement of fact regarding "Exhaustion of State Remedies" in his original complaint, wherein he states that he "has not filed grievances through the TDCJ Offender Grievance Program as the grievance tribunal has NO authority to take ANY action in response to his complaint." It therefore appears that Plaintiff's spurious objections are less than forthcoming and are without merit, especially in light of the fact that he never produced a copy of the returned Step One grievance. Even if the Court were to overlook the blatant discrepancy between the allegations in Plaintiff's original complaint and his objections, and allow an exception to the exhaustion requirement due to Plaintiff's physical injury, he is still not entitled to federal relief as he has failed to state a claim that is cognizable under Section 1983. As stated in the Magistrate Judge's Report and Recommendation of December 3, 2003, the facts of this case do not

evidence deliberate indifference to Plaintiff's serious medical needs, and negligence, neglect or medical malpractice will not support a claim under Section 1983.

Accordingly, upon *de novo* review pursuant to 28 U.S.C. §636 (b)(1)(C), this Court is of the opinion that the Report and Recommendation of the Magistrate Judge should be, and it is hereby, **ACCEPTED** in its entirety and incorporated by reference herein.

It is **ORDERED** that the instant case is **DISMISSED**, with prejudice, for failure to state a claim for which relief is available.

DONE at Galveston, Texas, this the 24th day of May, 2005.



Samuel B. Kent
United States District Judge